SEE TEOW CHUAN & ANOR

v.

DATO' ANTHONY SEE TEOW GUAN

HIGH COURT MALAYA, KUALA LUMPUR
JAMES FOONG J
[CIVIL SUIT NO: S5-23-06-1997]
16 APRIL 1999

EVIDENCE: *Privilege - Legal professional privilege - Communication between solicitor and client - Legal opinion - Whether privileged - Whether there was illegality or fraud involved - Whether disclosure amounted to consent - Whether there was exemption from privilege on basis that opposing party had obtained a copy of the document - Whether confidentiality must be attached to legal professional privilege - Evidence Act 1950, s. 126*

LEGAL PROFESSION: *Professional privilege - Communication between solicitor and client - Documentary legal opinion - Whether solicitor can be compelled to disclose*

The plaintiffs' claim against the defendant was for defamation in relation to a legal opinion ('the legal opinion') prepared by a firm of solicitors, Shearn Delamore & Co ('the solicitors') for a public listed company, Kian Joo Can Factory Bhd ('the company'). The defendant's solicitors took their instructions from the defendant, acting on behalf of the company.

The issue which arose for determination was the admissibility or otherwise of: (i) the conversation between the solicitors and the defendant; and (ii) the legal opinion itself. A trial-within-a-trial was ordered to determine the admissibility of the aforesaid.

The plaintiffs' counsel argued that no privilege applied as: (i) the privilege was not absolute under s. 126 of the Evidence Act 1950 ('the Act'); (ii) there was consent to disclose the contents of the legal opinion by the disclosure to other officers of the company; (iii) the legal opinion had already come into the possession of the plaintiffs and was therefore exempted from privilege; and (iv) the communication between the defendant and the solicitors was not intended to be confidential.

Held:

[1] There was no evidence of illegality or fraud in obtaining the legal opinion to render the protection of s. 126 of the Act inapplicable.

[2] The disclosure of the legal opinion to officers of the company did not amount to a consent by the company to disclose its contents to the world at large.

[3] To allow the admission of a document on which professional privilege is claimed, on the basis that a copy is already in the possession of the other party, will render s. 126 of the Act vulnerable and ineffective, especially in situations where the document has been obtained by devious means.

[4] There is no express requirement in s. 126 of the Act that confidentiality must be attached to legal professional privilege. In any event, the evidence pointed to great confidentiality and the need for secrecy.

[5] Once privileged, a document is always privileged. The solicitors could not be compelled to disclose the communication from the defendant nor the legal opinion itself.

[Order accordingly.]

Case(s) referred to:
Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors [1989] 3 MLJ 445 ***(dist)***
Daya Shanker Dubey v. Subhas Kumar [1992] Cri LJ 319 ***(dist)***
Derby & Co Ltd & Ors v. Weldon & Ors (No 10) [1991] 2 All ER 908 ***(dist)***
Emperor v. Mariane G Rodrigues [1903] 5 Bombay Law Reports 122 ***(foll)***

Legislation referred to:
Evidence Act 1950, ss. 126, 127

For the plaintiffs - VK Lingam (Peter Raj with him); M/s VK Lingam & Co
For the defendant - Romesh Abraham (CM Teng with him); M/s Shook Lin & Bok

Reported by Anne Khoo

JUDGMENT

James Foong J:

The plaintiffs' claim against the defendant is for defamation on a legal opinion dated 14 November 1996 (the legal opinion) issued by a firm of solicitors, M/s Shearn Delamore & Company (the said solicitors) acting for a public listed company known as Kian Joo Can Factory Bhd (KJCF). The plaintiffs have alleged that the defendant had falsely and maliciously provided the said

solicitors orally, or in writing certain defamatory information and upon these the legal opinion was formulated. It is then claimed that the defendant was responsible for the publication of this legal opinion to various people.

The first witness to be called by the plaintiffs was one Miss Jeyanthini, the then senior legal assistant of the said solicitors who took instructions from the defendant and drew up legal opinion. She was asked the following pertinent questions which were responded with the respective answers:

Q1: Why did they (the defendant) come to see you?
A: I am unable to answer because of legal professional privilege.

Q2: Do you have a copy of the legal opinion to produce in this court?
A: I am unable to answer because of legal professional privilege.

On these, Mr. Romesh, counsel for the defendant, also rose to object to the admissibility of both the conversation between the said solicitors and client and the legal opinion. His ground is: s. 126 of the Evidence Act.

Encountered with this, I ordered a trial-within-a trial to determine on the admissibility of the aforesaid. The following is my judgment of the trial-within-a trial.

Section 126 of the Evidence Act (the Act) provides:

(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course of and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

Provided that nothing in this section shall protect from disclosure:

(a) any such communication made in furtherance of any illegal purpose;

(b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.

(2) It is immaterial whether the attention of the advocate was or was not directed to the fact by or on behalf of his client.

Dato' Lingam, counsel for the plaintiffs, advanced six grounds in his submission to overcome s. 126 of the Act.

The first is that this privilege is not absolute.

I am in full agreement with him on this. It could be waived by the consent of the client, and exempted if: it is in furtherance of any illegal purpose, or that showing any crime or fraud has been committed.

The second ground is that the "consent" of the client to disclose this communication and document "could have been endorsed in the document itself or given separately in writing to the effect that they (the client) consented to the document being released ..." – a phrase borrowed from Eusoff Chin J (as he then was) in *Dato' Au Ba Chi & Ors v. Koh Keng Kheng & Ors* [1989] 3 MLJ 445.

It must be firstly pointed out that the ruling in *Dato' Au Ba Chi's* case, is that the "express consent" set out in s. 126 of the Act must be in writing. It is based on this that the learned judge made the above observation according to the circumstances of the case. In our present situation, the evidence obtained from a trial-within-a trial reveals no such consent from KJCF. Though the defendant, when he received the legal opinion by fax, minuted thereon "Alice (the group financial officer) and Tunku (the chairman of the audit committee)", it does not amount to an express written consent by KJCF to disclose this communication and document. These are officers of the company itself and disclosure to them cannot be considered a consent by the company to disclose it to the world at large.

The third ground raised is based on a claim that a document already in possession of the opposite party and contained in the documents filed in court is exempted from a claim of legal professional privilege. Here Dato' Lingam cited two authorities: *Daya Shanker Dubey v. Subhas Kumar* [1992] Cri LJ 319 @ 323 and *Derby & Co Ltd & Others v. Weldon & Others (No 10)* [1991] 2 All ER 908 @ 917.

I have the opportunity of perusing these two cases, which I find them to be distinguishable; and do not set out any universal accepted principle except to accommodate the particular circumstances of the cases. In the Indian case of *Daya Shanker Dubey*, it involves a petition for contempt against the respondent in failing to obey certain order. One of the grounds was that the respondent's counsel had, at one time, given an opinion to the magistrate of Allahabad that the order passed by the court on 11 January 1991 was interpreted to mean that the panel lawyer which the petitioner was a member should be allowed to carry out some legal work on revenue matters for a certain district in Allahabad. Since the magistrate had ignored the advice of the respondent's counsel and failed to give work to the petitioner, the petitioner claimed that this aggravated the disobedience of the order. The respondent's counsel claimed

that this opinion he once gave was a privileged communication between advocate and client, and the petitioner cannot make use of it. Justice N.N. Mithal rejected this. Firstly on the ground that "the privilege can be claimed only when the advocate or the client are asked to disclose any professional communication between them." This I am in full agreement. But in our present case, PW1 was asked this very question, and she, in my opinion has every right to claim such privilege, and indeed she did.

The second ground of Justice N.N. Mithal judgment however, I take exception. He expressed that "such a privilege, however, cannot be claimed in respect of a document which has already come in possession of the opposite party and has filed on record." Such view, if of general application, can be exceedingly dangerous. Imagine a situation where the plaintiff had obtained a document by devious means and exhibit it in his affidavit when, on such document, professional privilege is claimed. To allow this to be admitted, when neither client nor solicitor consented to its disclosure, would make the provision of s. 126 of the Act completely vulnerable and ineffective. In our present set of circumstances, PW1 has clearly claimed the privilege against disclosure, and there is no evidence in the trial-within-the trial that her client (KJCF) have given their consent for such release; then I cannot see how such document can be admitted through this witness.

As for the case of *Derby & Co Ltd,* the privilege claimed is firstly not legal professional privilege. Secondly, the circumstances of that case involves a whole series of cases where the judge felt that the conversation between the client and their investigators had already been brought to issue in a manor action in which basically the parent company of the plaintiffs against the defendants for unauthorised advances by the defendants then in control of one of the companies which the plaintiffs' parent company subsequently took over, thereby guilty of dishonesty or breach of fiduciary duty. The only passage, I think, the plaintiffs' counsel relied on is in para f of p. 917 of the report where Justice Vinelott suggested:

> The point can be tested in this way. Suppose that Mr. Comer or Mr. Price had exhibited a transcript of the tape to an affidavit in support of their claims as to the extent of the knowledge of the plaintiffs and the ambit of Network's retainer. Would the plaintiffs then have been entitled to claim privilege? It seems to me that the answer to that question is No. If that is right, the plaintiffs cannot claim privilege now.

This answer may be appropriate in the factual matrix of the case, but it does not involve, as I stressed earlier, legal professional privilege – which is set out under our statutory provision of s. 127 of the Act. If such question in our present factual situation is asked, my answer must be: Yes. The client has every right to object since the opening phrase of this particular section reads: "No advocate shall be permitted ..." Thus unless express consent in writing by client is given to PW1 the legal opinion cannot be disclosed through her.

The fourth ground advanced is that the communication by the defendant and the said solicitors was not intended to be confidential.

Here I am in full agreement with the defendant's counsel's argument that firstly there is no express requirement in s. 126 of the Act that the element of confidentiality must be attached to this privilege. Even if one reads into this such a requirement, in the light of the Indian authority of *Emperor v. Mariane G Rodrigues* [1903] vol V The Bombay Law Report 122, I find, no evidence that the communication and the document so made between the said solicitors and their client was made merely as a matter of fact and under no condition of secrecy. The evidence point to great confidentiality and the need of secrecy according to the facts as exposed.

On this fifth point, the plaintiffs alleged that there was furtherance of an illegal purpose, thereby the proviso (a) of s. 126 of the Act applies.

I fail to detect the furtherance of an illegal purpose from the evidence of the witnesses called by the plaintiffs. On the contrary most of them testified that there was no such illegal purpose in obtaining the legal opinion. There were irregularities, alleged to be committed by the plaintiffs on the company (KJCF), and the legal opinion was sought to request the plaintiffs to clarify and explain. Though this may be a strange way of proceeding with it, but yet I cannot come to a conclusion that this can amount to an illegal purpose.

On the last point, Dato' Lingam submitted that since the plaintiffs were given the legal opinion because they have an interest therein, such privilege is removed. I cannot accept this contention for "once privileged it will always privilege" – see *Dato' Au Ba Chin's* case. It does not matter whether the subject matter concerns the plaintiffs or they obtained it from whom. But as far as PW1 is concerned, she does not need to disclose the instruction given to her by the defendant or tender the legal opinion she prepared on ground of legal professional privilege.

Based on the aforesaid, I hereby rule that PW1 cannot be compelled to disclose the communication she had with the defendant and the production of the legal opinion.